Supreme Court, U. S.
FILED
JUL 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-107

MICHAEL P. KATRANIS and
CHRIST M. KATRANIS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARL ZIEMBA
Attorney for Petitioners
2000 Cadillac Tower
Detroit, Michigan 48226
(313) WO 20525

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

TABLE OF CONTENTS

	Page
Index to Authorities Cited	ii
Orders Below	2
Statement of Jurisdiction	2
Constitutional, Statutory and Rule Provisions Involved	2
Questions Presented	5
Statement of Facts	6
Reasons for Granting the Writ	13
Conclusion	31
Appendix "A"—Order of the Court of Appeals for the Sixth Circuit affirming petitioners' convictions	33
Appendix "B"—Order of the Court of Appeals for the Sixth Circuit denying petitioners' Petition for Rehearing	34
Appendix "C"—Indictment filed in District Court Criminal No. 47858	35
Appendix "D"—Indictment filed in District Court Criminal No. 48377	38

AUTHORITIES CITED

Cases: Page

American Tobacco Company v United States, 328 US 781, 66 S Ct 1125 (1946) 24

Keck v United States, 172 US 434, 19 S Ct 254 (1899) 30

Meer v United States, 235 F2d 65 (CA10 1956) ... 27

Mortsen v United States, 322 US 369, 64 S Ct 1040 (1944) 24

Russell v United States, 369 US 749, 82 S Ct 1038 (1962) 15, 30

United States v Apex Distributing Company, 148 F Supp 365 (D RI 1957) 28

United States v Baker, 444 F2d 1290 (CA10 1971) 24

United States v Baker, 494 F2d 1262 (CA6 1974) 21, 23

United States v Cameron, 460 F2d 1394 (CA5 1972) 21

United States v Cruikshank, 92 US 542 (1875) ... 14

United States v Hess, 124 US 483, 8 S Ct 571 (1888) 15

United States v Huff, 512 F2d 66 (CA5 1975) ... 16

United States v Irick, 369 F Supp 594 (SD Tex 1974) 28

United States v Leggett, 292 F2d 423 (CA 6, 1961) 24

United States v McCall, 460 F2d 952 (CADC 1972) 24

United States v Seeger, 303 F2d 478 (CA 2 1962) 27

Page

United States v Simmons, 96 US 360 (1877) 14

United States v Whitman, 480 F2d 1028 (CA6 1973) 23

United States v Williams, 470 F2d 1339 (CA8 1973) 21, 29

Other:

6th Amendment, United States Constitution 3, 27, 31

5th Amendment, United States Constitution 2, 13, 31

18 USC, Section 924(c)(2) 4, 5, 7

18 USC, Section 1510(2) 3, 4, 6, 8, 20, 21, 22, 24, 26, 29

Rule 7(c), Fed Rules of Crim Proc..... 5, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

MICHAEL P. KATRANIS and
CHRIST M. KATRANIS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael P. Katranis and Christ M. Katranis, by their attorney, Carl Ziemba, respectfully petition this Court issue its Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in an Order dated May 16, 1975 and Order denying rehearing entered on June 17, 1975 in the above entitled matter, Nos. 75-1205 and 75-1206, consolidated by order on appeal.

ORDERS BELOW

The Court of Appeals did not issue an opinion. The Order of the Court affirming petitioners' convictions was entered on May 16, 1975 and is unpublished. It is appended hereto as Appendix "A".

The Order of the Court of Appeals denying petitioners' petition for rehearing was entered on June 17, 1975. It is unpublished and is appended hereto as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals affirming petitioners' convictions was embodied in its Order entered May 16, 1975. Petitioners' petition for rehearing was timely filed and its was denied by Order dated June 17, 1975.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18, United States Code, Sections 1510 and 2 provide as follows:

> § 1510. Obstruction of criminal investigations.
>
> (a) Whoever willfully endeavors by means of bribery, misrepresetnation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or
>
> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

Title 18, United States Code, Sections 924 (c) and 2 provide as follows:

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

Rule 7 (c) of the Federal Rules of Criminal Procedure provides as follows:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

QUESTIONS PRESENTED

I.

Whether under an indictment charging a violation of 18 924(c) the commission of the offense of knowingly carrying and using handguns during the commission of the offense of obstruction of a criminal investigation must identify the offense of obstruction of a criminal investigation with particularity other than giving merely the date of the offense.

II.

Whether under an indictment charging a violation of 18 USC, Sections 1510 and 2 the trial court erred in not directing a verdict of acquittal when the evidence showed that the government's theory of the case was that petitioners threatened the complainant with violence if he went to the FBI with a report of the beating which he received at the hands of petitioners, an act which was not a federal offense.

III.

Whether an indictment charging an offense under 18 United States Code, Sections 1510 and 2 is insufficient for failure to allege that the federal officers involved were authorized to investigate violations of federal law and for alleging the use of "threats" instead of "threats of force".

STATEMENT OF FACTS

Both Petitioners and one Gregory George "Pete" Katranis were charged in a two count indictment in District Court, Criminal No. 47858 with (1) conspiring to prevent by threats and intimidation one George Nicolaou from communicating to special agents of the FBI information relating to violations of Section 1955 and 1511 of Title 18, USC, and (2) with commission of the substantive offense which was allegedly the subject of the conspiracy. *This indictment was dated and filed October 4, 1972* (a13).* See Appendix "C" hereof.

* The (a) in the parentheses refers to Petitioners' Appendix filed in the United States Court of Appeals for the Sixth Circuit; the numbers, to the pages within.

Both Petitioners and the said Gregory George "Pete" Katranis were charged in a second indictment of one count in District Court, Criminal No. 48377 with the commission of the offense of knowingly carrying and using "two handguns, during the commission of the offense of obstruction of a criminal investigation", in violation of Sections 924(c) and 2 of Title 18, USC. *This indictment was dated and filed February 21, 1973* (a16). See Appendix "D" hereof.

Prior to trial, said Gregory George "Pete" Katranis died.

Prior to trial, the Government moved the court to consolidate Criminal No. 47858 and Criminal No. 48377 for the alleged reason that both indictments were based on precisely the same transaction (a18).

Petitioners answered this motion for consolidation with assertions that it did not appear from the faces of the indictments that the same grand jury returned both indictments and that the grand jury found that the charge laid in the second indictment arose out of the same events which were involved in the first indictment (a21, a25).

The court granted the Government's motion and entered an order consolidating for trial the two indictments (a28).

Petitioners filed a motion to quash the indictment in No. 47858 on the bases (1) that there was no allegation in the indictment that "Special Agents of the Federal Bureau of Investigation are individuals authorized by a department, agency, or armed forces of the United States to conduct investigations of or prosecutions for violation of the criminal laws of the United States"; (2) that the language of 18 USC 1510 proscribes the use of "force or threats thereof" but that the indictment charges the use of "threats"

simply; and (3) that the indictment does not set forth precisely what acts of the defendants which were in violation of 18 USC 1510 (a30).

Petitioners filed a motion to quash the indictment in No. 43377 on the basis that the crime charged—using a firearm in the commission of a felony—was dependent on the commission by defendant of a felony and although the indictment named the felony in terms of the statute, no particulars of the felony were alleged so that petitioners could know what they were to defend themselves against and could not protect against double jeopardy (a33, a35).

The court denied petitioners' motions (a38).

The case was tried to a jury.

Upon the completion of the Government's opening statement to the jury, Petitioners moved the court to direct a verdict of acquittal in their favor and to declare a mistrial on the following grounds: (1) the government attorney asserted that Petitioners had punished complainant for *past acts* of giving information to the FBI whereas the indictment charged Petitioners with endeavoring to prevent complainant from giving information to the FBI in the *future;* (2) that the information which Petitioners endeavored to keep from being communicated concerned an assault made by them upon the complainant, an act which was not a violation of any federal criminal statute; and (3) that the assertion by the government's attorney that the Petitioners were intent on taking over gambling operations in the hotel in question and other places was an impermissible mention of other crimes.

The court denied both motions.

George Nicolaou, the complainant, testified that at about 4:00 am to 4:30 am of May 28, 1972, he went to the Clifford

Hotel in the City of Detroit (a43) to gamble. When he entered, he saw "Fat" Bernie with a cut lip and blood on his T shirt (a45). He then saw Petitioner Mike Katranis behind a table with a cane (a45). Mike said "Mr. Nick, the FBI informer" (a45). Pete Katranis, Mike's brother, said "Who is this" (a45). Mike said: "The FBI informer" . . . "My brother Pete just got out of prison" (a45).

The witness then testified that he was shaking hands with Pete when he noticed blood on his hand (a51), and then Pete hit the witness with a gun on the right cheek and called him "You son of a bitch. What you talk to the FBI for?" (a51). The witness denied having talked to the FBI and then Pete hit him on the kidney side with the gun (a51). Pete again asked the witness "Why did you talk to the FBI" and the witness said "I didn't talk to the FBI" (a52). Pete hit him with the gun again (a52) and asked "Why you go and talk to the FBI or the police when you're not supposed to? (a53) and the witness said "I didn't say anything" (a53). Mike Katranis then said: "He's going to talk to the FBI all right. I know he's going to talk to the FBI" (a53). Then Christ Katranis said: "Now we know where you live and where you work. If you talk to the FBI, we going to get you" (a54). Pete said that they would use "Coke" bottles on the witness's daughters (a54). Then all three said: "Don't talk to the FBI or the police. We know where you live and we're going to get you and your family. We got cousins and uncles and they going to get you even if we don't find you ourselves" (a56). After the defendants and Pete left, someone said: "Mike Katranis, Christ and Pete Katranis, they were going to take the Clifford over and the gambling over and around downtown, all the gambling places" (a67).

Petitioners objected to the last statement of the witness as being hearsay and irrelevant (a57). The court overruled

the objection (a65) and cautioned the jury that the statement was not being offered for the truth of the contents but merely that it was said (a66).

On cross-examination, Nicholaou testified that in 1969 about Eastertime he was in business as a barber in the Park Avenue Baths and was accused by one Lynn Carey of stealing money from her (a76). Petitioner Mike Katranis talked to the witness about the theft and struck the witness (a77); the witness characterized this as a beating and he went to the FBI about it (a77). The witness did not see Petitioner Mike Katranis from the time of the beating until the morning of May 28, 1972 except to say "hi" once (a79).

Robert W. Knapp, a government agent, was called by the government. He testified on cross examination that he interviewed Nicolaou at the hospital after the Clifford Hotel incident, and that he appeared before the grand jury (a85) and that the United States Attorney who was trying the case for the Government appeared with him before the grand jury and asked the witness this question:

> "Q. And just to review the testimony you have previously given, Michael and Peter Katranis—correct me if I'm wrong—according to Mr. Nicolaou were the individuals who threatened him with great bodily harm or death if he went to the FBI concerning this beating."

and that the witness answered "That's correct" (a86).

The Government called two witnesses in an endeavor to prove that the gambling at the Clifford Hotel was in violation of Section 1955 of Title 18.

This was essentially the Government's case.

At the conclusion of the presentation of the Government's case, Petitioners moved the court (1) to direct a verdict of acquittal in favor of Petitioners on the basis that the Government's opening statement did not set forth a violation of a federal criminal statute, (2) to dismiss the indictments because the grand jury had before it insufficient evidence upon which to return an indictment, and (3) to direct a verdict of acquittal on all counts for the reason (a) that no conspiracy was shown and proven by the evidence and (b) that the evidence showed that Petitioners sought to prevent the communication to the FBI of information concerning their beating of Nicolaou, an act which was not a violation of any federal criminal statute (a87).

The court denied Petitioners' motion based upon the Government's opening statement (a91).

The court denied Petitioners' motion to dismiss the indictment (a92).

The court granted a judgment of acquittal on Petitioners' motion for acquittal on the conspiracy count (a94).

The court denied Petitioners' motion for a judgment of acquittal on the substantive count (a98).

The Petitioners rested without offering any evidence whatever, and they renewed their motions made at the conclusion of the Government's case with the court rendering the same rulings as initially (a99).

The jury returned verdicts of guilty against Petitioners on Count II of the indictment in No. 47858 and on the indictment in No. 48377.

Petitioners filed a motion seeking the setting aside of the verdicts and for the entry of a judgment of acquittal on the basis that the evidence was insufficient to sustain a conviction for the reason that the evidence did not establish that Petitioners sought to prevent the communication of information regarding a violation of 18 USC 1955 (a39).

The court denied this motion.

The court sentenced Petitioner Christ Katranis to a term of 3 years on No. 47858 and to a term of 1 year on 48377, the terms to run consecutively.

The court sentenced Petitioner Michael Katranis to a term of 5 years in No. 47858 and to a term of 5 years in No. 48377, the terms to run consecutively.

Both Petitioners filed their appeals in timely manner as a matter of right, and their appeals were consolidated in the Court of Appeals.

The Court of Appeals affirmed Petitioners' convictions and denied Petitioners' petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

AN INDICTMENT MUST ALLEGE ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED AND IT MUST STAND ON ITS OWN CONTENT WITHOUT DEPENDENCE FOR ITS VALIDITY ON THE ALLEGATIONS OF ANY OTHER INDICTMENT.

The indictment in No. 47858 charging the substantive crime of making threats of force to prevent communication and conspiracy to commit that offense was dated by the grand jury on *October 4, 1972.*

Some four months later, *a* grand jury handed up an indictment dated *February 21, 1973,* charging that Petitioners used two hand guns during the commission of the offense of obstruction of a criminal investigation.

The date of the offense set forth in the second indictment is given as "on or about the 28th day of May, 1972." No other information is given. Neither the place of the offense nor the name of the offended party nor any particulars of the offense is given in the indictment.

The trial court granted the Government's motion to consolidate the two indictments for trial on the basis that the two offenses arose out of the same events.

° ° °

Since petitioners had a right under the 5th Amendment and the Sixth Amendment to the Constitution of the United States to be informed in an indictment of the precise charges against them, it was error for the court to order the consolidation for trial of the two indictments because there was no way to determine from the faces

of the two indictments that the grand jury found that the offense set forth in the second indictment was committed concurrently with the offense set forth in the first indictment, and that the grand jury had in mind the offense charged in the first indictment when they handed up the second indictment.

° ° °

In *United States v Cruikshank,* 92 US 542, 558 (1875), the Court said:

> "The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

In *United States v Simmons,* 96 US 360, 362 (1877), the Court found the indictment to be insufficient where defendant was charged with causing or procuring some one to use a still and the name of that person was not given in the indictment:

> "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he

> may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

In *United States v Hess,* 124 US 483, 487, 8 S Ct 571, 573 (1888), where the defendant was charged with devising a scheme to defraud but the scheme was not described in particulars in the indictment, the Court said:

> "The doctrine invoked by the solicitor general, that it is sufficient in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

See also *Russell v United States,* 369 US 749, 82 S Ct 1038 (1962), for a thorough analysis of the question of the sufficiency of allegations in an indictment and for a complete citation of authorities.

Particular note should be taken of the statement by the Court in *Russell, supra,* that a bill of particulars cannot save an invalid indictment:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a de-

> fendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

The Court's attention is respectfully directed to the case of *United States v Huff*, 512 F2d 66, 69 (CA 5, 1975), where the defendant was charged in the first count of the indictment with distribution of "3, 4 methylenedioxy", a controlled substance, and in the second count with possession with intent to distribute "methylenedioxy amphetamine". On trial defendant moved for an acquittal on the second count on the basis that "methlenedioxy amphetamine", as distinguished from "3, 4 methylenedioxy", was not a controlled substance.

The trial court denied the motion and told the jury that the words "methylenedioxy amphetamine" in the second count "should be described as 3, 4 methylenedioxy amphetamine, the same substance as described in Count One".

In reversing defendant's conviction on the second count, the Court said as follows:

> "Federal Rules of Criminal Procedure 7(c) states that the indictment 'shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.' Courts have generally understood and implemented this rule so as to let common sense rather than mere technicalities govern the determination of the sufficiency of an indictment. *But even a liberal construction of this simple rule does not dispense with the requirement that an indictment or each count thereof allege all the essential elements of an offense. United States v Clark,* 412 F.2d 885, 891 (5th Cir. 1969). To be sure, "[a]llegations made in one count may be incorporated by reference in another count." Fed. F. Crim. P. 7(c). *But each count of an indictment must be regarded as if it were a separate indictment and must stand on its own content without dependence for its validity on the allegations of any other count not expressly incorporated.* See Dunn v. United States, 284 U.S. 390, 393, 52 S. Ct 189, 76 L.Ed 356 (1932); United States v. Greene, 497 F.2d 1068 (7th Cir. 1974); United States v. Roberts, 465 F.2d 1373 (6th Cir. 1972). Here, the challenged count of the indictment alleges nothing more than an act which is legal. And such a failure to allege a crime cannot be remedied by proof or curative instructions 'which attempt to incorporate other counts not expressly referred to in the challenged count. A grand jury indictment may be amended only by resubmission to a grand jury, 'unless the change is merely a matter of form.' *Russell v. United States,* 369 U.S. 749, 770-771, 82 S. Ct. 1038, 8 L.Ed. 2d 240 (1962); *Stirone v. United States,* 361 U.S. 212, 215-217, 80 S. Ct. 270, 4 L.Ed 2d 252 (1960); *Ex parte Bain,* 121 U.S. 1, 7 S. Ct. 781, 30 L.Ed. 849 (1887)." (Emphasis added.)

II.

THREATS OF FORCE MADE TO PREVENT COMMUNICATION TO FEDERAL OFFICIALS OF INFORMATION CONCERNING A STATE CRIME IS NOT A FEDERAL OFFENSE.

AN ACCUSED MUST HAVE KNOWLEDGE THAT ANOTHER HAS INFORMATION OF A FEDERAL OFFENSE WHICH HE INTENDS TO COMMUNICATE TO FEDERAL OFFICIALS.

At the conclusion of the Government's case and after the Government rested, Petitioners moved the court to direct a verdict of acquittal on all counts in favor of the Petitioners.

The court granted Petitioners' motion for far as Count I in No. 47858 was concerned—the conspiracy count—and the court directed a verdict of acquittal in favor of Petitioners on that count.

The court denied the balance of Petitioners' motion.

After Petitioners rested without offering any evidence, Petitioners renewed their motion for a directed verdict of acquittal on the remaining counts.

The court denied this motion.

After the verdict of the jury was returned and in timely manner, Petitioners filed a motion with the court seeking the court to enter a judgment of acquittal in their favor. The court denied this motion.

° ° °

The court erred in denying said motions because there was an absence of evidence to take the case to the jury and to support the verdict returned for the reason that all of the evidence supported Petitioners' theory that if any threats were made by Petitioners to George Nicolaou they

were made in relation to the beating allegedly visited upon him which was an act not prosecutable in the federal courts.

° ° °

The evidence is quite clear that in 1969, George Nicolaou was accused of stealing money from her by one Lynn Carey (a76) and that Petitioner Mike Katranis remonstrated with Nicolaou about the accusation and either struck or beat Nicolaou (a77). It is clear that Nicolaou went to the FBI after this incident and told about having been beaten (a77) by Mike Katranis. It is clear that George Nicolaou never gave the FBI any information about any gambling activities of the defendants (a70). It is further clear that no evidence was presented at trial that the Petitioners had any proprietary interest in or connection with the gambling operation at the Clifford Hotel. It is further clear that no evidence was presented at trial that the Petitioners were intent on taking over the gambling operation at the Clifford Hotel or any other gambling operation; the testimony on this subject given by George Nicolaou was clearly hearsay and so held to be by the trial judge who gave a cautionary instruction to the jury to that effect (a66). It is further clear that George Nicolaou did not meet Petitioner Mike Katranis since being beaten by him in 1969 until the morning of May 28, 1972 except for one time when he merely said "hi" to him (a79).

Thus it is clear that when on the morning of May 28, 1972 Petitioner Mike Katranis saw George Nicolaou and hailed him as the FBI informer, Mike Katranis was making reference to the occasion when Nicolaou went to the FBI with a report of his having been beaten by Mike Katranis in 1969. The beating of Nicolaou which followed, if it did occur, was in retribution for Nicolaou's having gone to the FBI in 1969.

It cannot be said that the beating of Nicolaou on May 28, 1972 was a violation of 18 USC 1510 because it was, if anything, an injury to a person on account of the giving by such person of information to a criminal investigator, and the indictment laid against Petitioners did not charge them with this offense; and further, it was not for the giving of information concerning the violation of any criminal statute of the United States.

In other words, *18 USC 1510* proscribes two types of acts: (1) acts designed to prevent the future communication of information to investigators, and (2) acts designed to injure one for having in the past given information to investigators. The beating of Nicolaou on May 28, 1972 by Petitioner, if it did occur, was of the second category of acts, if anything. But Petitioners were charged in the indictment with an act or acts of the first category.

It is too obvious for argument to be made or authority to be cited that *18 USC 1510* defines two different crimes and that a defendant charged in an indictment with the commission of one of them cannot on trial be convicted of the other.

Hence, we are left, from the evidence, with the threats allegedly made by the Petitioner to Nicolaou. These threats fall into the first category above and are in fact the acts of the defendants which are charged in the indictment. The indictment charged that the Petitioners did endeavor by threats to prevent Nicolaou from communicating information to investigators.

From the evidence we must decide what information these threats were designed to prevent from being communicated by Nicolaou to investigators, if in fact the threats were made.

The element of scienter is here important.

In *United States v Williams,* 470 F2d 1339 (CA 8, 1973), the Court quoted from the report of the House Committee on the Judiciary on *18 USC 1510* to the effect that if an accused did not know that the recipient or intended recipient of the information was a federal investigator, then the accused would not be in violation of the statute because then he would lack scienter.

Similarly, in *United States v Baker,* 494 F2d 1282 (CA 6, 1974), the Court deemed a substantial question to be in that case whether the accused was aware of the existence of a pending federal proceeding and that the offended person was a witness therein, and the Court rejected the Government's contention that a reasonably founded belief by the accused that the person he attempts to influence is a witness in a pending federal proceeding furnishes the requisite scienter for a violation of 18 USC 1503.

In *United States v Cameron,* 460 F2d 1394, 1401 (CA 5, 1972), the Court referring to the House report on 18 USC 1510 said:

> "This Report makes clear that Section 1510 was designed to deter the coercion of potential witnesses by the *subjects* of federal criminal investigations prior to the initiation of judicial proceedings." (Emphasis added.)

Hence, it should follow that an accused cannot have the necessary scienter to be in violation of *18 USC 1510* unless he knows that he is the subject of a federal criminal investigation or unless he knows that the person he intends to interfere with has information which would make him the subject of such investigation.

In the case at bar, there is no evidence that Petitioners were the subjects of a federal criminal investigation. There was no evidence that Petitioners were in violation of any federal criminal statute. There was no evidence that Petitioners knew that George Nicolaou had any information that Petitioners were in violation of any federal criminal statute. And there was no evidence that George Nicolaou had any information that the Petitioners were in violation of any federal criminal statute. What George Nicolaou *heard* from some person whom he could not identify and of whose identity he never was aware cannot be said to be "information" that the Petitioners were in violation of any federal criminal statute.

Therefore, it cannot be said that the Petitioners had the necessary scienter to be in violation of *18 USC 1510*.

If it is believed that the threats were made to Nicolaou by the Petitioners, concerning what subject were they made?

The answer was given by the Assistant United States Attorney who tried the case at bar, and who presented the evidence to the grand jury which led to the handing up of the indictment in the case, and by the agent who investigated the matter when he interviewed George Nicolaou in the hospital shortly after Nicolaou was allegedly beaten on May 28 in the Clifford Hotel.

Before the grand jury, the Assistant United States Attorney asked the agent, Robert W. Knapp, the following question:

> "Q. And just to review the testimony you have previously given, Michael and Peter Katranis — correct me if I'm wrong—according to Mr. Nicolaou were the individuals who threatened him with great bodily harm or death if he went to the FBI *concerning this beating.*"

and the agent answered "That's correct" (a86). (Emphasis added.)

It is clear from the careful formulation of the above question by the government attorney and from the unequivocal answer given by the government agent that they understood George Nicolaou to have said that he was threatened by the Petitioners with harm if he reported to the FBI that they had beaten him in the Clifford Hotel on the morning of May 28, 1972.

And there is nothing in the testimony of George Nicolaou which could persuade one beyond a reasonable doubt that the threats referred to anything else but his going to the FBI concerning the beating which he received in the Clifford Hotel on May 28, 1972.

The threats, if made, clearly were made to prevent the communication by Nicolaou of information to investigators concerning the beating which he allegedly received at the Clifford Hotel on May 28, 1972. But this act of the Petitioners was in law an assault and battery or possibly a felonious assault under Michigan law; it was not a violation of any federal statute of a criminal nature. As such, the acts of Petitioners did not fall under the proscriptive sanctions of 18 USC 1510.

Under the circumstances and under the evidence in the case, there was insufficient evidence to carry the case to the jury and the court should have granted Petitioners' motion for a directed verdict. See *United States v Whitman,* 480 F2d 1028 (CA 6, 1973); *United States v Baker,* 494 F2d 1262 (CA 6, 1974).

The court also erred in denying Petitioners' motion for a judgment of acquittal filed after trial. The verdict in a criminal case is sustained only when there is relevant

evidence from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty. *Mortsen v United States,* 322 US 369, 64 S Ct 1040 (1944); *American Tobacco Co v United States,* 328 US 781, 66 S Ct 1125 (1946).

In passing upon a motion for judgment of acquittal, the trial judge must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If the trial judge concludes upon such evidence there must be such a doubt, he must grant the motion. The jury must not be allowed to guess and conjecture. *United States v McCall,* 460 F2d 952 (CA DC, 1972); *United States v Leggett,* 292 F2d 423 (CA 6, 1961); *United States v Baker,* 444 F2d 1290 (CA 10, 1971).

III.

THE INDICTMENT MUST ALLEGE THAT THE FEDERAL OFFICIAL TO WHOM INFORMATION CONCERNING A FEDERAL CRIME IS INTENDED TO BE COMMUNICATED IS AUTHORIZED TO INVESTIGATE COMMISSION OF FEDERAL CRIMES.

UNDER THE STATUTE, THE MAKING OF "THREATS" IS NOT AN OFFENSE; THE MAKING OF "THREATS OF FORCE" IS AN OFFENSE.

The statute under which Petitioners were charged in No. 47858—*18 USC 1510*—provides that "the term 'criminal investigator' means any individual authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States".

This language can only mean that if a person is not authorized to investigate or prosecute for violations of the criminal laws of the United States then the prevention by an accused of the communication of information to him by another is no offense under this statute.

Hence, a person may be an employee of the Federal Bureau of Investigation but may not be authorized to investigate for violations of the criminal laws of the United States, or he may be an employee of the Department of Justice but may not be authorized to prosecute for violations of the criminal laws of the United States. Prevention by an accused of the communication of information to such person by another is no offense under this statute.

Judicial notice may be taken of the fact that many employees of the Federal Bureau of Investigation are not authorized to investigate for violation of the criminal laws of the United States. How can one know, and more to the point, how can members of the grand jury know which employees and which agents of the Federal Bureau of Investigation are authorized to investigate violations of the criminal laws of the United States?

And must not the members of the grand jury find specifically that the individual to whom one was prevented from communicating information was authorized to either investigate or prosecute for violations of the criminal laws of the United States?

And must not the grand jury set forth in the indictment handed up that the accused prevented another from communicating information concerning violation of a criminal statute of the United States to an individual who was authorized to investigate or prosecute for the violation of the criminal laws of the United States?

The answer must be "yes" because without the element being present of an individual who is authorized to investigate or prosecute for violations of the criminal laws of the United States no offense under this statute is committed.

° ° °

The language of *18 USC 1510(a)* proscribes the use of threats of force to accomplish the end of preventing the communication of information; the language does not proscribe any "threat".

The language is:

> "Whoever willfully endeavors by means of bribery, misrepresentation, intimidation or *force of threats thereof* . . ."

In No. 47858 in Count Two, it is charged that the Petitioners

> " . . . did willfully and knowingly endeavor, and cause an endeavor *(sic)*, by means of force, threats and intimidation to obstruct. . . . "

It can be seen that Petitioners were charged with endeavoring to accomplish the forbidden end by "threats" but not necessarily threats of force.

Under the lang ge of the indictment, a jury could find that Petitioners made a "threat" but not a threat of force or to use force and convict the Petitioners on that basis, and such conviction would not conform to the proscriptive intent of the statute.

° ° °

Petitioners in their motion to quash the indictment in No. 48858 specifically mentioned the above two shortcomings in the indictment.

It was error for the trial court to deny Petitioners' said motion to quash the indictment.

° ° °

In *United States v Seeger,* 303 F2d 478, 482 (CA 2, 1962), where the defendant was charged with contempt of Congress, the Court being concerned with the defendant's right under the *Sixth Amendment to the Constitution* "to be informed of the nature and cause of the accusation" made against him, held that a conviction under 2 USCA 192, the statute under which defendant was charged, could not be sustained unless the committee of Congress was duly empowered to conduct the investigation and that the inquiry was within the scope of the grant of authority, and that:

> "In view of this constitutional mandate, and the undisputed fact that the Government must establish that a committee or subcommittee was duly authorized and that its investigation was within the scope of the delegated authority, an indictment under Section 192 is defective if the authority is not pleaded, . . . "

In *Meer v United States,* 235 F2d 65, 67 (CA 10, 1956), where the defendant was charged with perjury for making a false statement in a bankruptcy proceeding, the Court held:

> "While materiality of the false statement to the matter under inquiry or to the issue presented is not expressly made an element of the offense, we are of the opinion that Congress did not intend to make it an offense to make a false statement in a bankruptcy proceeding, where such statement involved matters extraneous to such proceeding and not material to the inquiry or issue presented. . . .

> "We conclude that materiality of the false statement to the matter under inquiry or to an issue raised in the proceeding is an essential ingredient of the offense defined in [18 USCA 152]. . . .
>
> "It is not sufficient to charge an offense in the words of the statute, unless the words themselves fully, directly and expressly and without uncertainty or ambiguity set forth all the essential elements constituting the offense intended to be punished."

In *United States v Apex Distributing Company,* 148 F Supp 365 (USDC D RI 1957), where the defendants were charged with conspiring to defraud the Government, it was held that under the statute there in question, it was immaterial that the officer of the United States Navy who was bribed did not have the authority to place the orders in question and that, therefore, failure to allege that fact in the indictment does not render the indictment insufficient. But the count of indictment which charged a violation of the Federal Food, Drug and Cosmetic Act must contain an allegation that the activity of defendants involved interstate commerce because the court's jurisdiction is conferred through the interstate commerce clause of the Constitution. The court went on to dismiss the count for insufficiency because of a lack of averment of the interstate nature of the shipment involved.

In *United States v Irick,* 369 F Supp 594, 597 (USDC SD Tex 1974), defendants were charged that they did "forcibly assault, resist, oppose, impede, intimidate, and interfere with . . . a Special Agent of the Drug Enforcement Administration, United States Department of Justice." Section 111 of Title 18 prohibits such conduct when directed

towards any person designated in 18 USC 1114, but Section 1114 does not name special agents of the Drug Enforcement Administration. The court in finding the indictment not to state an offense said:

> "A narrow, literal reading of the statute is consistent with general principles of criminal law. (Citations.) The maxim, *expressio unius est exclusio alterius* (expression of one thing implies exclusion of another) is appropriate here. A court should not depart from the plain meaning of the statutory language. (Citation.) Also relevant is the principle that penal sanctions are to be strictly construed. (Citation.) The definition of criminal conduct is a legislative rather than judicial function, and the Courts should be reticent to broadly read criminal statutes."

See also *United States v Williams,* 470 F2d 1339 (CA 8, 1973), where the Court finds that authorization to investigate is an element of the offense under Section 1510.

° ° °

The second count of the indictment in No. 47858 recites that Petitioners:

> " . . . did willfully and knowingly endeavor, and cause an endeavor, by means of force, threats and intimidation to obstruct, delay and prevent the communication of information by George Nicolaou relating to violations of 18 U.S.C. 1955 and 1511 to Special Agents of the Federal Bureau of Investigation . . . "

In their motion to quash the indictment, Petitioners complained that the averments in Count II lacked specificity

and cited to the court *Russell v United States*, 369 US 749, 82 S Ct 1038 (1962) in support of the principle that the language of an indictment must descend to particulars so that an accused might know what it is that he must meet on trial.

Petitioners also cited to the trial court and cite to this Court. *Rule 7(c), Federal Rules of Criminal Procedure* which provides:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential *facts* constituting the offense charged. . . ." (Emphasis added.)

See also: *Keck v United States*, 172 US 434, 19 S Ct 254 (1899).

Petitioners timely raised the above issues to the trial court (a30, a33) in conformity to *Rule 12(b)(2) Federal Rules of Criminal Procedure.*

It was error for the trial court to deny Petitioners' motion to quash the indictment.

CONCLUSION

It is respectfully submitted that for the reasons above given, the Order of the Court of Appeals for the Sixth Circuit affirming Petitioners' convictions is in conflict with the decisions of this Court and with the requirements of the 5th and 6th Amendments to the Constitution of the United States such that plenary review should be granted in this Court and Petitioners' request for a Writ of Certiorari should be granted.

Respectfully submitted,

CARL ZIEMBA
Attorney for Petitioners
2000 Cadillac Tower
Detroit, Michigan 48226
(313) WO 20525

APPENDIX "A"

ORDER

Nos. 75-1205 and 75-1206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Michael C. Katranis and
Christ P. "Chris" Katranis,
Defendants-Appellants.

(Filed May 16, 1975)

(John P. Hehman, Clerk)

Before: Edwards, Celebrezze, and Lively, Circuit Judges.

Appellants were convicted upon a jury verdict of endeavoring to prevent the communication to FBI agents of information concerning violations of 18 U.S.C. §§ 371, 1511, and 1955, in violation of 18 U.S.C. §§ 1510 and 2, and of aiding and abetting another person in using handguns during the obstruction of a federal criminal investigation, in violation of 18 U.S.C. §§924(c) and 2. Appellants take a direct appeal from their convictions, assigning nine counts of error.

Upon consideration of the record, briefs, and oral argument, it appears that Appellants were properly convicted of the federal offenses charged, that the evidence supports the verdict, and that no reversible error was committed by the District Court.

Accordingly, the judgments of conviction should be, and they hereby are, affirmed.

Entered by Order of the Court

/s/ John P. Hehman

Clerk

APPENDIX "B"

ORDER

Nos. 75-1205, 75-1206

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,
v.
Michael C. Katranis and
Christ P. "Chris" Katranis,
Defendants-Appellants.

(Filed June 17, 1975)

(John P. Hehman, Clerk)

Before: Edwards, Celebrezze, and Lively, Circuit Judges.

Appellants having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises.

It is Ordered that the petition for rehearing be, and it is hereby denied.

Entered by Order of the Court

/s/ John P. Hehman

Clerk

APPENDIX "C"

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America, Plaintiff, v. Michael C. "Mike" Katranis, Gregory George "Pete" Katranis, and Christ M. "Chris" Katranis, Defendants.	Criminal No. 47858 Violations: 18 U.S.C. 1510 18 U.S.C. 371 18 U.S.C. 2

The Grand Jury charges:

Count One

1. From on or about the 27th day of May, 1972, and continuously thereafter, up to and including the 28th day of May, 1972, in the Eastern District of Michigan, and elsewhere, Michael C. "Mike" Katranis, Gregory George "Pete" Katranis, and Christ M. "Chris" Katranis, the defendants herein, did unlawfully, knowingly, and willfully conspire, combine, confederate and agree together and with each other, to violate Section 1510 of Title 18, United States Code.

2. It was a part of said conspiracy that the defendants, Michael C. "Mike" Katranis, Gregory George "Pete" Katranis, and Christ M. "Chris" Katranis would willfully and knowingly endeavor by means of force, threats and intimidation to obstruct, delay and prevent the communica-

tion of information by one George Nicolaou relating to violations of Sections 1955, 1511, and 371, of Title 18, United States Code, by Michael C. "Mike" Katranis, Gregory George "Pete" Katranis and Christ M. "Chris" Katranis to Special Agents of the Federal Bureau of Investigation.

Overt Acts

At the times hereinafter mentioned, the defendants and co-conspirators committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about May 28, 1972, the defendants Michael C. "Mike" Katranis, Gregory George "Pete" Katranis, and Christ M. "Chris" Katranis entered the premises of the Clifford Hotel in Detroit, Michigan.

2. On or about May 28, 1972, the defendant Michael C. "Mike" Katranis had a conversation with and relating to George Nicolaou.

3. On or about May 28, 1972, the defendant Gregory George "Pete" Katranis struck George Nicolaou with his fists and with the butt end of a handgun.

All in violation of Section 371, Title 18, United States Code.

Count Two

On or about the 28th day of May, 1972, in the Eastern District of Michigan, the defendants Michael C. "Mike" Katranis, Gregory George "Pete" Katranis, and Christ M. "Chris" Katranis did willfully and knowingly endeavor, and cause an endeavor, by means of force, threats and intimidation to obstruct, delay and prevent the communica-

tion of information by George Nicolaou relating to violations of 18 U.S.C. 1955 and 1511 to Special Agents of the Federal Bureau of Investigation, United States Department of Justice, in the Eastern District of Michigan.

All in violation of Sections 1510 and 2, Title 18, United States Code.

This is a True Bill

/s/ Fred D. Lalter
Foreman

/s/ Ralph B. Guy, Jr.
United States Attorney

/s/ Laurence Leff
Attorney in Charge
Detroit Strike Force
United States Department of Justice
Organized Crime and Racketeering Section
1064 Federal Building
Detroit, Michigan 48226
(Telephone: 226-7252)

Dated: 10-4-72

APPENDIX "D"

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Filed February 21, 1973)

United States of America, Plaintiff, v. Michael P. "Mike" Katranis and Christ M. "Chris" Katranis, Defendants.	Criminal No. 48377 Violation: 18 U.S.C. 2 and 924(c)

The grand jury charges:

On or about the 28th day of May, 1972, in the Eastern District of Michigan, Michael P. "Mike" Katranis and Christ M. "Chris" Katranis did unlawfully and knowingly use and carry, and did aid, abet and willfully and knowingly cause Gregory George "Pete" Katranis and Christ M. "Chris" Katranis to carry certain firearms, to wit: two handguns, during the commission of the offense of obstruction of a criminal investigation, a felony prosecutable in a court of the United States;

All in violation of Title 18, United States Code, Sections 924(c) and 2.

This is a True Bill.

/s/ Fred D. Lalter
Foreman

Ralph B. Guy, Jr.
United States Attorney
Eastern District of Michigan

Laurence Leff
Attorney in Charge
Detroit Strike Force
United States Department of Justice
1064 Federal Building
Detroit, Michigan 48226
Telephone: 226-7252

Dated: 2-21-73